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Nos. 96-330 & 96-742

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

OFFICIAL COMMITTEE OF TORT CLAIMANTS, *Petitioner*,

—v.—

DOW CORNING CORPORATION, THE DOW CHEMICAL COMPANY, CORNING INCORPORATED, BAXTER INTERNATIONAL INCORPORATED, MINNESOTA MINING AND MANUFACTURING COMPANY, BRISTOL-MYERS SQUIBB COMPANY AND MEDICAL ENGINEERING CORPORATION, *Respondents*.

BREAST IMPLANT TORT CLAIMANTS REPRESENTED BY O'QUINN, KERENSKY, MCANINCH & LAMINACK, *Petitioners*,

—v.—

DOW CORNING CORPORATION, *et al.*, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT MINNESOTA MINING AND MANUFACTURING COMPANY

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit erred in ruling that the United States District Court for the Eastern District of Michigan had subject matter jurisdiction pursuant to 28 U.S.C. § 1334(b) over silicone gel breast implant claims pending against non-debtor codefendants because such claims were "related to" the chapter 11 case of Dow Corning Corporation.

2. Whether the Sixth Circuit erred in ruling that the United States District Court for the Eastern District of Michigan had the power under 28 U.S.C. § 157(b)(5) to fix the venue for trial of silicone gel breast implant claims pending against nondebtor codefendants which are "related to" the chapter 11 case of Dow Corning Corporation.

LIST OF PARTIES

In addition to the parties listed in the caption, the following are parties to the proceeding in the Sixth Circuit: Baxter Healthcare Corporation; Heidi Lindsey; Johnson County, Texas, Plaintiffs; Breast Implant Tort Claimants Represented by O'Quinn, Kerensky, McAninch & Laminack; Mississippi Physicians; and Official Committee of Unsecured Creditors, as Intervenor.

RULE 29.6 LISTING

Pursuant to Supreme Court Rule 29.6, respondent Minnesota Mining and Manufacturing Company states that it does not have a parent company. Its subsidiaries (other than wholly owned subsidiaries) are Eastern Heights State Bank of St. Paul (Minn.), Sumitomo 3M Limited (Japan), 3M Health Care Limited (Japan), 3M Korea Limited (Korea), and Birla 3M Limited (India).

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Respondent, Minnesota Mining and Manufacturing Company ("3M") respectfully requests that this Court deny the petitions for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit (the "Petitions") seeking review of the Sixth Circuit's decision in *Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers (In re Dow Corning Corp.)*, 86 F.3d 482 (6th Cir.), *petition for cert. filed*, 65 U.S.L.W. 3167 (U.S. Aug. 28, 1996) (No. 96-330).

OPINIONS BELOW

The opinion of the Sixth Circuit (Tort Comm. Pet. App. 1a-28a),[1] is reported at 86 F.3d 482 (6th Cir. 1996). On June 3, 1996, the Sixth Circuit issued its mandate and denied petitions for rehearing and rehearing en banc (*id.* at 65a-66a). The initial opinions of the United States District Court for the Eastern District of Michigan (*id.* at 29a-64a) are reported at 187 B.R. 919 (E.D. Mich. 1995) and 187 B.R. 934 (E.D. Mich. 1995). The opinion of the United States District Court for the Eastern District of Michigan on remand (App., *infra*, RA 1-RA 8) is unreported.

STATUTORY PROVISIONS INVOLVED

The principal statutory provisions involved are:

28 U.S.C. § 1334(b), which provides:

> Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil

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[1] "Tort Comm. Pet. App." refers to the appendix to the Petition for a Writ of Certiorari of the Offical Committee of Tort Claimants.

> proceedings arising under title 11, or arising in or related to cases under title 11.

28 U.S.C. § 157(b)(5), which provides:

> The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

STATEMENT OF THE CASE

Dow Corning Corporation ("DCC") was the predominant producer of silicone gel breast implants until it ceased their manufacture in 1992. Because thousands of recipients of silicone gel breast implants asserted claims for compensatory and punitive damages in federal and state court actions against DCC, on May 15, 1995, DCC was forced to file for protection under chapter 11 of title 11, United States Code (the "Bankruptcy Code"), in the United States Bankruptcy Court for the Eastern District of Michigan.

On the date DCC commenced its chapter 11 case, over 7,000 implant lawsuits, representing the claims of over 15,000 plaintiffs, had been filed against respondent 3M, which ceased manufacturing breast implants in 1984. Record 265.[2] DCC has been named as a codefendant with 3M in over 5,000 of those 7,000 lawsuits. *Id.* In virtually every case, plaintiffs asserted claims of joint and several liability against 3M and DCC for the full amount of their asserted damages. *Id.* Additionally, in approximately 60% of the cases against 3M, the plaintiff received multiple sets of breast implants in a series of separate operations, including implants made by

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[2] "Record __" refers to the Record filed in connection with the decision below.

3M and at least one other manufacturer, which included DCC in most cases. Record 473.

Thousands of other cases were also filed against Bristol-Myers Squibb Corporation and Medical Engineering Corporation (together "Bristol-Myers"), Baxter International Incorporated and Baxter Healthcare Corporation (together "Baxter"), as well as other defendants, including the 50% shareholders of DCC, The Dow Chemical Company ("Dow Chemical") and Corning Incorporated ("Corning," and collectively with 3M, Bristol-Myers, Baxter, and Dow Chemical, the "Nondebtor Codefendants"). As with the cases against 3M, many of the cases against the other Nondebtor Codefendants also named DCC as a codefendant, asserted joint and several liability, and involved implants from multiple manufacturers.

The decision below held that the claims against the Nondebtor Codefendants were related to DCC's reorganization case within the meaning of 28 U.S.C. § 1334(b) because DCC's successful reorganization would be directly impacted by the resolution of the thousands of claims for indemnification and contribution generated by the breast implant actions, including claims asserted by the Nondebtor Codefendants against DCC and vice versa.

Background

Prior to DCC's chapter 11 filing, on June 25, 1992, the Judicial Panel on Multidistrict Litigation (the "MDL Panel") ordered the centralization of pretrial proceedings in all of the thousands of federal breast implant actions that have been filed against DCC and the Nondebtor Codefendants, and transferred the actions to Chief Judge Pointer of the Northern District of Alabama (the "Multidistrict Court"). *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, MDL No. 926, 793 F. Supp. 1098, 1099-1101 (J.P.M.L. 1992). The MDL Panel

found that these actions involve complex common questions of fact and that centralization would best serve the convenience of the parties and witnesses, promote the just and efficient conduct of litigation, avoid duplication of discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel, and the judiciary. *Id.*

On March 23, 1994, a proposed class action settlement (the "1994 Settlement") was reached among DCC, the Nondebtor Codefendants, and the plaintiffs' steering committee, and was approved by the Multidistrict Court by order dated September 1, 1994. *Lindsey v. Dow Corning Corp. (In re Silicone Gel Breast Implant Prods. Liab. Litig.)*, No. CV 92-P-10000-S, MDL No. 926, Civ. A. No. CV94-P-11558-S, 1994 WL 578353 (N.D. Ala. Sept. 1, 1994). By mid-1995, however, it became apparent that the funds provided for in the 1994 Settlement would be inadequate to fund the claims filed by plaintiffs who alleged, but had not proved, any causation between silicone gel breast implants and any alleged disease or injury. *Id.*

On December 22, 1995, the Multidistrict Court approved a revised version of the 1994 Settlement, which did not include DCC. *Lindsey v. Dow Corning Corp. (In re Silicone Gel Breast Implant Prods. Liab. Litig. (MDL 926))*, No. CV 94-P-11558-S (N.D. Ala. 1995) (Order No. 27 approving revised settlement program and injunctions). Various appeals have been taken regarding the revised settlement, which are currently pending in the Eleventh Circuit.

Proceedings Below

A. The District Court

As a result of DCC's chapter 11 filing on May 15, 1995, the silicone gel breast implant actions of plaintiffs who had, at that time, opted out of the 1994 Settlement (collectively, the "Implant Actions") were automatically stayed from prosecution against DCC pursuant to 11 U.S.C. § 362(a). The

Implant Actions against the Nondebtor Codefendants, however, were not stayed despite the fact that in most cases joint and several liability was asserted against DCC and one or more of the Nondebtor Codefendants.

In June 1995, DCC and the Nondebtor Codefendants filed separate motions pursuant to 28 U.S.C. § 157(b)(5) to transfer to the District Court for the Eastern District of Michigan (the "District Court") the claims asserted in pending federal and state court Implant Actions in which DCC was a party (collectively, the "Implant Claims"). Specifically, on June 12, 1995, DCC moved to transfer to the District Court the Implant Claims pending against it and its shareholders, Dow Chemical and Corning, indicating that it would seek to have the transferred claims consolidated for a threshold jury trial on the issue of whether silicone gel breast implants caused the diseases which were alleged. Record 2. Dow Chemical and Corning joined in DCC's motion. *Id.* Similarly, on June 14, 1995, 3M, Baxter, and Bristol-Myers each filed a motion to transfer the Implant Claims asserted in Implant Actions in which the respective Nondebtor Codefendants were named as codefendants with DCC. Record 6, 15. No request to transfer was made in cases in which DCC was not involved.

By memorandum opinion and order, dated September 12, 1995 (Tort Comm. Pet. App. 29a-56a), the District Court asserted jurisdiction under 28 U.S.C. § 1334(b) with respect to the Implant Claims pending against DCC and permitted transfer of such claims pursuant to 28 U.S.C. § 157(b)(5), without ordering the generic causation trial that DCC had requested. Record 389. However, the District Court denied DCC's motion to the extent it related to claims against its corporate shareholders, Dow Chemical and Corning. *Id.*

By separate memorandum opinion and order, dated September 12, 1995 (Tort Comm. Pet. App. 57a-64a), the District Court denied all of the Nondebtor Codefendants' § 157(b)(5) transfer motions on the ground that it lacked subject matter

jurisdiction over the Implant Claims against the Nondebtor Codefendants pursuant to 28 U.S.C. § 1334(b) because such claims were not "related to" DCC's bankruptcy. Record 388.

B. The Court of Appeals

Applying the broad jurisdictional grant of 28 U.S.C. § 1334(b), the Sixth Circuit reversed the District Court's determination that it lacked subject matter jurisdiction over the Implant Claims against the Nondebtor Codefendants and that it did not have the power to transfer those claims pursuant to 28 U.S.C. § 157(b)(5). Tort Comm. Pet. App. 28a.

In reaching its holding, the Sixth Circuit concluded that its decision would "further the prompt, fair, and complete resolution of all claims 'related to' bankruptcy proceedings and harmonize Section 1334(b)'s broad jurisdictional grant with the oft-stated goal of centralizing the administration of a bankruptcy estate." *Id.* at 26a. Because the joint liability claims pending against DCC and the Nondebtor Codefendants give rise to contingent claims for indemnification or contribution among all of the defendants, including DCC, which could ripen into fixed claims, the potential that DCC will be held liable to the Nondebtor Codefendants for indemnification or contribution, or vice versa, "suffices to establish a conceivable impact" on DCC's estate. *Id.* at 20a.

The Sixth Circuit believed that in the event plaintiffs were to prevail on their respective claims against the Nondebtor Codefendants, the possibility of liability for contribution or indemnification was "far from attenuated." *Id.* at 21a. Accordingly, the Sixth Circuit concluded that there is § 1334(b) subject matter jurisdiction over the Implant Claims against the Nondebtor Codefendants because claims for indemnification or contribution, whether asserted against or by DCC, would "affect the size of the estate and the length of time the bankruptcy proceedings will be pending, as well as [DCC's] ability to resolve its liabilities and proceed with

reorganization." *Id.* at 20a. The Sixth Circuit refrained, however, from addressing the issue of abstention under 28 U.S.C. § 1334(c) in the first instance and remanded to the District Court for further case by case proceedings on that issue. *Id.* at 28a.

On July 30, 1996, the District Court abstained from adjudicating all the Implant Claims against the Nondebtor Codefendants pursuant to 28 U.S.C. § 1334(c)(1) and (2). App., *infra*, RA 1. The Nondebtor Codefendants have appealed that decision to the Sixth Circuit (the "Abstention Appeal"). Record 552, 553, 557, 560, 563, 566, 567. When petitioner Official Committee of Tort Claimants (the "Tort Committee") moved to dismiss the Abstention Appeal on jurisdictional grounds, the Sixth Circuit ordered that the jurisdictional issue be argued along with the merits of the appeal and established an expedited briefing schedule. *Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers (In re Dow Corning Corp.)*, Nos. 96-2005, 96-2008 to 96-2013, slip op. at 2 (6th Cir. Sept. 24, 1996). Final briefs were filed on November 19, 1996. Oral argument has not yet been scheduled.

REASONS FOR DENYING THE WRIT

The procedural posture of the decision below weighs heavily against petitioners' request for a writ of certiorari. The questions presented are not ripe for review at this time because the Nondebtor Codefendants are currently appealing from the District Court's decision, on remand, to abstain from exercising its subject matter jurisdiction over the Implant Claims against the Nondebtor Codefendants. As a result, unless and until the District Court's abstention decision is reversed, there is no controversy for the Court to resolve. On the other hand, in the event the District Court's abstention decision is affirmed or the appeal is dismissed, a decision by this Court would be an advisory opinion rendered in the absence of an actual case or controversy.

Moreover, petitioners have failed to demonstrate any compelling reason that would warrant this Court's review. While the issues are of importance to the parties to the proceeding, they are of minimal importance to the development of the law. Petitioners have also failed to demonstrate the existence of a conflict of decisions among the courts of appeals. In its decision, the Sixth Circuit neither criticized nor refused to follow the decisions of other circuit courts of appeals. In fact, the Sixth Circuit expressly stated that it adopted the Third Circuit's test established in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984), for determining whether a proceeding is related to a bankruptcy case under 28 U.S.C. § 1334(b).

Not only is the decision below consistent with those circuit court decisions alleged by petitioners to be conflicting, but it also is completely consistent with this Court's decision in *Celotex Corp. v. Edwards*, 115 S. Ct. 1493 (1995). Notwithstanding petitioners' assertion of an alleged conflict of decisions, the errors asserted essentially consist of the "misapplication," in petitioners' view, of a properly stated rule of law. This clearly does not constitute a compelling reason for certiorari review.

Finally, petitioners have failed to demonstrate that the Sixth Circuit misapplied either (i) 28 U.S.C. § 1334(b) by ruling that the Implant Claims against the Nondebtor Codefendants were related to DCC's bankruptcy case, or (ii) 28 U.S.C. § 157(b)(5) by ruling that the District Court had the power to fix venue for trial of the Implant Claims against the Nondebtor Codefendants.

I. THE PROCEDURAL POSTURE OF THE INTERLOCUTORY DECISION BELOW RENDERS THE ISSUES UNRIPE FOR REVIEW AT THIS TIME

The decision to grant certiorari "represents a commitment of scarce judicial resources." *City of Okla. City v. Tuttle*, 471

U.S. 808, 816 (1985). In this regard, the ripeness doctrine prevents the courts, "through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Lab. v. Gardner*, 387 U.S. 136, 148 (1967). It is a principle of timing in which the Court must look at the situation at the present time rather than at the time of the decision below. *Anderson v. Green*, 115 S. Ct. 1059, 1060 (1995) (citing *Blanchette v. Connecticut Gen. Ins. Corp. (Regional Rail Reorganization Act Cases)*, 419 U.S. 102, 140 (1974)). The doctrine is often used where future events may affect the justiciable nature of a controversy, making it more apt for review at a later date. *See, e.g., Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985). Thus, an action must be sufficiently mature so that it is considered an actual case or controversy as required by Article III of the United States Constitution. U.S. Const. art. III, § 2, cl. 1; *see also Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993) ("ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction").

Although the Court has jurisdiction to review interlocutory judgments of federal courts of appeals, *see* 28 U.S.C. § 1254(1), the Court will generally not exercise its jurisdiction before a final judgment is issued in the lower courts. *See, e.g., Virginia Military Inst. v. United States*, 508 U.S. 946 (1993); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("except in extraordinary cases, the writ is not issued until final decree"); *Cobbledick v. United States*, 309 U.S. 323, 325 (1940).

The Court has frequently determined that issues remanded by courts of appeals were unfit for review pending final judgment and subsequent court of appeals review. For example, in *Virginia Military Institute v. United States*, 508 U.S. 946 (1993), the Court denied certiorari to review a decision of the court of appeals which remanded the case to the district court for the determination of an appropriate remedial course in

the matter under review. *Id.* In refusing to grant the writ, the Court stated "[w]e generally await final judgment in the lower courts before exercising our certiorari jurisdiction." *Id.*[3]

Consistent with these cases, the questions presented in the Petitions are not ripe for Supreme Court resolution in light of the pending appeal from the District Court's decision to abstain from exercising its subject matter jurisdiction. In the event the Sixth Circuit either affirms or declines to review the District Court's abstention decision, the questions presented in the Petitions will become moot. The issues of related to jurisdiction under 28 U.S.C. § 1334(b) and transfer pursuant to 28 U.S.C. § 157(b)(5) will not be appropriate for certiorari review until and unless the Sixth Circuit reverses the District Court's abstention decision. If the Sixth Circuit either (1) dismisses the appeal on jurisdictional grounds or (2) affirms on the merits, no Implant Claims against the Nondebtor Codefendants will be transferred, and there will be no actual controversy for this Court to consider.

Moreover, in the event the Sixth Circuit issues a final judgment on the abstention issues, there is a significant likelihood that a subsequent petition for a writ of certiorari will be filed. Accordingly, denial of petitioners' request for a writ of certiorari at this time further serves the federal policy against piecemeal litigation. *See Catlin v. United States*, 324 U.S. 229, 233-34 (1945); *see also Goldstein v. Cox*, 396 U.S. 471, 478 (1970) ("In the absence of clear and explicit authorization by Congress, piece-meal appellate review is not favored.").

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[3] *See also Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostock R.R. Co.*, 389 U.S. 327, 328 (1967) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court."); *cf. Mercer v. Theriot*, 377 U.S. 152, 153 (1964) (Court initially denied certiorari where court of appeals remanded case until subsequent rulings were issued by district court and court of appeals); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (Court refused to review interlocutory decree and did not grant writ until second appeal after final decree).

Petitioners clearly will not suffer any hardship by a denial of certiorari at this time. As a result of the District Court's decision to abstain from exercising subject matter jurisdiction over the Implant Claims against the Nondebtor Codefendants, petitioners have thus far obtained their desired result. That is, the Implant Claims against the Nondebtor Codefendants have not been transferred to the District Court. Petitioners thus cannot argue that the decision below has affected them in any concrete manner. Withholding the Court's consideration of the questions presented at the present time would have absolutely no adverse effect on petitioners.

Accordingly, because petitioners have not suffered any injury, and any future effect of the decision below remains wholly speculative in light of the pending appeal from the District Court's abstention decision, the Court should deny certiorari as the questions presented are not ripe for review at this time.

II. THE PETITIONS FAIL TO DEMONSTRATE ANY COMPELLING REASON FOR THE COURT TO EXERCISE ITS DISCRETION TO GRANT CERTIORARI

The Court's review on a writ of certiorari is purely a matter of judicial discretion that is exercised "only for compelling reasons." Sup. Ct. R. 10. A petition for certiorari "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.* Rather, the jurisdiction of the Court is "exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

Here, the errors asserted by petitioners present no "compelling reasons" for review by the Court. Although petitioners attempt to create the appearance of a conflict between

circuits over an unsettled federal question of public importance, petitioners' reasons for review actually amount to nothing more than dissatisfaction with the Sixth Circuit's application of the rule regarding "related to" subject matter jurisdiction that has been adopted by virtually every circuit court of appeals. Accordingly, even if review at this time were not barred by the ripeness doctrine, the Petitions should nevertheless be denied.

A. Petitioners Have Mischaracterized the Importance of the Questions Presented

As the Court has observed, "it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties." *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923); *see United States v. Nobles*, 422 U.S. 225, 241-42 n.16 (1975) ("In the absence of . . . an indication that the issues are of sufficient general importance to justify the grant of certiorari we decline to entertain them.").

In an effort to obtain review by the Court, petitioners have mischaracterized the Sixth Circuit's decision as a novel ruling effecting a "wholesale enlargement of the bankruptcy jurisdiction at the expense of state judicial authority." Tort Comm. Pet. 10. In actuality, however, the decision below represents nothing more than the application of well-settled and long-standing principles of law.

The so-called "enlargement" of bankruptcy jurisdiction by the Sixth Circuit in the decision below is entirely consistent with Congress's expansive grant of jurisdiction to the district courts in bankruptcy cases. In the decision below, the Sixth Circuit began with the "premise that the 'emphatic terms in which the jurisdictional grant is described in the legislative history, and the extraordinarily broad wording of the grant itself, leave us with no doubt that Congress intended to grant to the district courts broad jurisdiction in bankruptcy cases.' "

Tort Comm. Pet. App. 10a (quoting *Kelley v. Nodine (In re Salem Mortgage Co.)*, 783 F.2d 626, 634 (6th Cir. 1986)). In fact, in its most recent pronouncement on this issue, this Court has agreed that the congressional intent was to " 'grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate.' " *Celotex Corp. v. Edwards*, 115 S. Ct. 1493, 1499 (1995) (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)).

The decision below was premised upon the Sixth Circuit's fact-specific application of legal principles which have been adopted by this Court and every circuit court of appeals to consider the issue. Contrary to petitioners' concerns, the Sixth Circuit has not enlarged the jurisdiction of the bankruptcy courts; it merely found the existence of "related to" jurisdiction consistent with congressional intent.

In contending that the Sixth Circuit's application of this long-standing grant of jurisdictional power alters the way in which mass tort actions will be litigated in the future, petitioners ignore the abstention provisions under 28 U.S.C. § 1334(c). As Congress has indicated, "in order to insure that the jurisdiction of the bankruptcy court is exercised only when appropriate to the expeditious disposition of bankruptcy cases, the bill codifies present case law relating to the power of abstention in particular proceedings by the bankruptcy court." H.R. Rep. No. 95-595, at 51 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6012. Thus, statutory abstention enables the district court, in appropriate circumstances, to determine whether hearing a particular case would " 'promote or impair efficient and fair adjudication of bankruptcy cases' " in order to serve the interests of justice and judicial economy. Tort Comm. Pet. App. 27a (quoting *Salem*, 783 F.2d at 635).

Petitioners' concern with the "prospective impact" the decision below could have on the "fundamental division of judicial authority under familiar principles of the federal system" (Tort Comm. Pet. 10), thus does not directly involve

§ 1334(b) jurisdiction, as alleged by petitioners. Rather, it involves principles of abstention—the very issue that is currently pending before the Sixth Circuit in the Abstention Appeal.[4] As this Court has stated, "[f]ederal courts abstain out of deference to the paramount interests of another sovereign, and the concern is with principles of comity and federalism." *Quackenbush v. Allstate Ins. Co.*, 116 S. Ct. 1712, 1724 (1996). Any assertion concerning the impact of the decision below on the federal system will be addressed by the Sixth Circuit in the context of abstention and is thus premature and not ripe for review by the Court at this time.

Thus, contrary to petitioners' contention, the decision below does not represent a departure from existing law that alters the way in which mass tort actions will be litigated.

B. The Decision Below Does Not Present Any Conflict With Decisions of the Courts of Appeals or This Court

Because a conflict with decisions of circuit courts of appeals or this Court could constitute a "compelling reason" warranting certiorari, petitioners construct an illusory conflict between the Sixth Circuit decision below and the Third and Seventh Circuit decisions in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984) and *In re Fedpak Systems, Inc.*, 80 F.3d 207 (7th Cir. 1996), respectively, and this Court's decision in *Celotex Corp. v. Edwards*, 115 S. Ct. 1493 (1995).

1. The *Pacor* Decision

Contrary to petitioners' assertion that the decision below conflicts with the Third Circuit decision in *Pacor*, the Sixth Circuit explicitly adopted the test established in *Pacor*, stat-

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[4] In the Abstention Appeal, 3M has urged reversal on the grounds that the District Court misapplied the congressionally imposed statutory criteria for bankruptcy abstention and ignored the letter and spirit of the Sixth Circuit's holding in the decision below.

ing: "Our Circuit adopted the *Pacor* test for determining whether a civil proceeding is 'related to' a bankruptcy proceeding under Section 1334(b)." Tort Comm. Pet. App. 11a.

In *Pacor*, the Third Circuit adopted the following test for determining the existence of "related to" jurisdiction:

> The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding *could conceivably have any effect on the estate being administered in bankruptcy*. Thus, the proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to bankruptcy if the outcome *could alter* the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which *in any way impacts upon the handling and administration of the bankrupt estate*.

Pacor, 743 F.2d at 994 (emphasis added) (citations omitted).

Under the facts of that case, the Third Circuit concluded that an action between a tort plaintiff and a supplier of asbestos was not related to the bankruptcy case of the Johns-Manville Corporation, the alleged manufacturer of the asbestos. The fact that *Pacor* held that related to jurisdiction did not exist in that case, however, does not establish that the Third Circuit's decision is in conflict with the Sixth Circuit's decision below. On the contrary, as stated above, the decision below is entirely consistent with the test established in *Pacor*. After expressly stating that it adopted the *Pacor* test, the Sixth Circuit applied the *Pacor* test to the facts of DCC's bankruptcy to reach its holding that all Implant Claims, including those brought against respondent, could well alter the debtor's liability and thus have an effect on DCC's estate.

Petitioners' perceived conflict stems from the different factual circumstances in the two cases. The distinction that the Third Circuit drew in *Pacor* between the plaintiff's claim

against the supplier and the supplier's claim-over against Manville cannot be drawn in the case at bar in light of the intertwined nature of the Implant Claims against the Nondebtor Codefendants and the Nondebtor Codefendants' claims-over against DCC. In *Pacor*, there was no allegation that plaintiff had been injured by the joint conduct of the supplier and Manville or that the liability of the supplier and Manville was joint and several. Plaintiff sued only the supplier; it did not sue both the supplier and Manville. In fact, in a companion case to *Pacor* involving similar facts, the Third Circuit described the relationship as follows: "The [plaintiff-supplier] action and the [supplier]-Manville action are two *separate and distinct claims*. Their joinder or severance is merely a matter of procedural convenience, and does not imply any substantive interdependence between the two." *Hanna v. Philadelphia Asbestos Co.*, 743 F.2d 996 (3d Cir. 1984) (emphasis added).

Here, the implant plaintiffs have sued DCC and the Nondebtor Codefendants jointly and severally. Thus, in each Implant Action, a single claim has been asserted against DCC and one or more of the Nondebtor Codefendants for damages arising from their alleged joint conduct. As a matter of law, where two or more parties are held jointly and severally liable for producing a single indivisible harm, the joint tortfeasors are substantively liable for all damages. 3 Fowler V. Harper et al., *The Law of Torts* § 10.1, at 7 (2d ed. 1986). Unlike the two claims in *Pacor*, which are "separate and distinct," the claims against DCC and the claims against the Nondebtor Codefendants arise out of the alleged joint conduct of multiple defendants which give rise to a single claim and are therefore substantively interdependent.

Because the implant plaintiffs challenge the combined actions of both DCC and the Nondebtor Codefendants, the resolution of such allegations necessarily involves a determination of the respective involvement of DCC and the Nondebtor Codefendants with respect to the conduct alleged.

Thus, the claims involved in the decision below are inextricably intertwined, unlike the claims in *Pacor*. Accordingly, the Sixth Circuit's decision does not conflict with the Third Circuit's decision, but, rather, follows it.[5]

Moreover, in *Pacor*, the potential impact on Manville's estate was minimal; there was no allegation that Manville's prospects for successfully reorganizing could have been affected by the plaintiff-supplier action. While *Pacor* involved only a single claim for indemnification or contribution, the decision below involved thousands of such claims. As the Sixth Circuit noted, "there is a qualitative difference between the single suit involved in *Pacor* and the overwhelming number of cases asserted against Dow Corning and the nondebtor defendants in this case." Tort Comm. Pet. App. 20a. Indeed, "[a] single possible claim for indemnification or contribution simply does not represent the same kind of threat to a debtor's reorganization plan as that posed by the thousands of potential indemnification claims at issue here." *Id.* at 20a-21a.

2. The *Fedpak* Decision

Petitioners also assert that the decision below "diverges" from the Seventh Circuit decision in *In re Fedpak Systems, Inc.*, 80 F.3d 207 (7th Cir. 1996). Tort Comm. Pet. 12. In that case, the district court determined that the debtor lacked standing to seek clarification of a bankruptcy court determination regarding the rights of various parties to a frozen dessert machine. The Seventh Circuit agreed that the debtor lacked standing, and further held that the debtor's request fell outside the scope of § 1334(b) because there was "only a remote connection between Fedpak's request for a clarifica-

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[5] In addition to following *Pacor*, the decision below also relies explicitly on another decision of the Third Circuit, *In re Marcus Hook Dev. Park Inc.*, 943 F.2d 261 (3d Cir. 1991). Tort Comm. Pet. App. 15a. Thus, rather than conflicting with the Sixth Circuit decision, Third Circuit decisions appear to have been a major source for the Sixth Circuit's analysis in reaching the decision below.

tion order and the administration of the bankruptcy estate." *Id.* at 213 n.7. Because the frozen dessert machine was no longer part of the debtor's estate, the court concluded that the request for clarification of rights in that machine would not affect the amount of property for distribution or the allocation of property among creditors. *Id.* at 214.

Notably, in addition to the fact that *Fedpak* also involved only one claim, as opposed to the thousands of claims in DCC's bankruptcy case, under *Fedpak's* formulation of the test for related to jurisdiction, the result obtained by the Sixth Circuit below would have been exactly the same. That is, related to jurisdiction would exist because the Implant Claims against the Nondebtor Codefendants affect the amount of property for distribution and the allocation of property among creditors, as set forth *supra*.

3. Other Circuit Court Decisions

In addition to asserting that the decision below conflicts with *Pacor* and *Fedpak*, petitioners Breast Implant Tort Claimants Represented by O'Quinn, Kerensky, McAninch & Laminack (the "O'Quinn Plaintiffs"), incorrectly assert that the decision below conflicts with other decisions of the Seventh Circuit as well as decisions of the Second and Eleventh Circuits. In actuality, however, the decision below does not conflict with any of the other decisions cited by the O'Quinn Plaintiffs. Simply put, whether litigated in the Second, Third, Seventh, or Eleventh Circuits, the result obtained in the decision below would have been exactly the same under any of the purportedly "conflicting" tests applied in those Circuits.[6]

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[6] For example, as demonstrated above, the Implant Claims against the Nondebtor Codefendants have a "significant connection" to DCC's bankruptcy, as required by the Second Circuit in *Turner v. Ermiger (In re Turner)*, 724 F.2d 338 (2d Cir. 1983). The result would also be the same under the test established in the Eleventh Circuit, which adopted the *Pacor* test for determining the existence of related to jurisdiction in *Miller v. Kemira, Inc. (In re Lemco Gypsum, Inc.)*, 910 F.2d 784 (11th

4. The *Celotex* Decision

In addition to being consistent with decisions of other circuit courts of appeals, the decision below is consistent with this Court's decision in *Celotex Corp. v. Edwards*, 115 S. Ct. 1493 (1995). In *Celotex*, petitioner Celotex posted a supersedeas bond with an insurance company serving as surety in order to stay execution of a tort judgment rendered against it in the district court, pending appeal. Celotex's obligations under the bond were secured by its pledge of certain settlement proceeds. *Id.* at 1496. After the Fifth Circuit affirmed the judgment, Celotex filed for chapter 11 bankruptcy. *Id.* The bankruptcy court subsequently issued an injunction that prohibited judgment creditors from proceeding against sureties without bankruptcy court permission. When a judgment creditor nonetheless sought permission from another court to execute against the bond, permission was granted. *Id.* at 1497.

This Court held that the judgment creditor was bound by the bankruptcy court's injunction and rejected the argument that the bankruptcy court lacked jurisdiction to issue the injunction, citing *Pacor* with approval. Specifically, this Court stated:

> Congress did not delineate the scope of "related to" jurisdiction, but its choice of words suggests a grant of some breadth. . . . We agree with the views expressed in *Pacor* . . . that "Congress intended to grant comprehensive jurisdiction to the bankruptcy

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Cir. 1990). In addition to interpreting § 1334(b) to "avoid the inefficiencies of piecemeal adjudication and promote judicial economy by aiding in the erficient and expeditious resolution of *all matters connected to the debtor's estate*," *id.* at 787 (emphasis added), the Eleventh Circuit concluded that an overlap between a debtor's affairs and another dispute is insufficient to confer § 1334(b) jurisdiction "unless its resolution also affects the bankrupt's estate or the allocation of assets among creditors." *Id.* at 789. As demonstrated above, the Implant Claims against the Nondebtor Codefendants significantly affect DCC's estate, satisfying the Eleventh Circuit's interpretation of *Pacor*.

> courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate," and that the "related to" language of § 1334(b) must be read to give district courts . . . jurisdiction over more than simple proceedings involving the property of the debtor or the estate. We also agree with that Court's observation that a bankruptcy court's "related to" jurisdiction cannot be limitless.

Id. at 1499 (quoting *Pacor*, 743 F.2d at 994). The Court explicitly recognized that proceedings "related to" a bankruptcy include "suits between third parties which have an effect on the bankruptcy estate," *id.* at 1498-99 n.5, and that the "jurisdiction of bankruptcy courts may extend more broadly in [a chapter 11 reorganization] case than in [a chapter 7 liquidation]." *Id.* at 1500.

Using the test established in *Pacor*, this Court determined that because the judgment creditor's immediate execution on the bond would, in turn, result in the insurer's efforts to foreclose on the collateral posted by Celotex, the judgment creditor's proceeding against the insurer "would have a direct and substantial adverse effect" upon Celotex's ability to reorganize, and therefore, was "related to" Celotex's bankruptcy:

> Admittedly, a proceeding by respondents against [the insurer] on the supersedeas bond does not directly involve Celotex, except to satisfy the judgment against it secured by the bond. But to induce [the insurer] to serve as surety on the bond, Celotex agreed to allow [the insurer] to retain the proceeds of a settlement resolving insurance coverage disputes between [the insurer] and Celotex. The Bankruptcy Court found that allowing respondents—and 227 other bonded judgment creditors—to execute immediately on the bonds would have a

> direct and substantial adverse effect on Celotex' ability to undergo a successful reorganization.

Id. The Court thus found that subject matter jurisdiction existed over a proceeding between nondebtors that would, in the future, directly affect the estate if the insurer (i) filed a motion for relief from the automatic stay imposed by § 362 of the Bankruptcy Code and (ii) commenced and won an action to foreclose on the collateral securing the bond.

Consistent with and explicitly citing and following this Court's decision in *Celotex*, the Sixth Circuit's decision below held that the resolution of the Implant Claims against the Nondebtor Codefendants would have a direct and substantial effect on DCC's ability to undergo a successful reorganization because the thousands of potential claims for indemnification and contribution could ripen into fixed claims, entitling DCC and the Nondebtor Codefendants to recover on their claims against each other.[7]

In order to complete its reorganization, DCC's liability for implant claims must be determined or estimated. Because the amount (if any) of DCC's liability for implant claims is, in part, a function of the Nondebtor Codefendants' share (if any) in the liability for the same plaintiffs' claims, a determination of DCC's liability cannot be made until the amount of damages (if any) awarded against the Nondebtor Codefendants, and DCC's allocable share thereof, are determined. The Sixth Circuit's holding that the Implant Claims against the Nondebtor Codefendants could conceivably have an effect on DCC's estate is thus completely consistent with this Court's decision in *Celotex*.

In short, petitioners' assertion that the decision below conflicts with *Celotex* and decisions of other circuit courts of

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[7] The fact that the claim in *Celotex* was secured and the claims in the decision below are unsecured is a distinction without a difference. Both claims affected the administration of the respective debtor's estate.

appeals simply obscures petitioners' true contention, which is that the Sixth Circuit misapplied the well-settled rule of law regarding "related to" jurisdiction. As noted above, a petition for certiorari is rarely granted when the asserted error consists of the alleged misapplication of a properly stated rule of law.

5. No Misapplication of Law

In any event, petitioners' allegations of misapplication are without merit. Petitioners' theory that jurisdiction under 28 U.S.C. § 1334(b) cannot exist over the Implant Claims against the Nondebtor Codefendants is based on the erroneous premise that the resulting claims-over for indemnification or contribution are not claims at all, either because they have not been formally asserted or because they are contingent.

First, petitioners' representation that the Nondebtor Codefendants have not pursued claims for contribution is wrong. In addition to ignoring that the Nondebtor Codefendants may have claims for *indemnification* in addition to claims for contribution, petitioners ignore the fact that 3M has repeatedly asserted such claims throughout DCC's chapter 11 bankruptcy. In fact, the decision below recognized that 3M and the other Nondebtor Codefendants have "asserted repeatedly throughout their briefs, motions, and oral arguments that they intend to file claims for contribution and indemnification against Dow Corning, and we have no reason to doubt the veracity of those assertions at this time."[8] Tort Comm. Pet. App. 20a. Additionally, respondent is under no obligation to file a formal proof of claim form prior to the January 15, 1997 bar date established in DCC's bankruptcy case.[9]

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[8] Upon information and belief, more than 10,000 such proofs of claim have already been filed in DCC's bankruptcy by one or more Nondebtor Codefendants based upon the Implant Actions.

[9] 3M's right to file a proof of claim is not affected in any way by the fact that claims-over were not previously asserted in the Implant Actions. The decision to wait to file such claims followed routine procedures, since a defendant that is sued as an alleged joint tortfeasor is not

Second, the contingent nature of a bankruptcy claim does not render that claim uncognizable. Petitioners' theory is completely contrary to the broad definition of a "claim" set forth in § 101(5) of the Bankruptcy Code, which explicitly includes contingent claims. *See* 11 U.S.C. § 101(5) (defining claim as a "right to payment, whether or not such right is reduced to judgment, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured").

Labeling a claim "contingent" does not mean it cannot have an impact on a debtor's estate. Implant Claims will result in fixed claims-over against DCC to the extent the Nondebtor Codefendants pay plaintiffs to satisfy a liability jointly held with DCC. Conversely, the potential claims-over of DCC against the Nondebtor Codefendants are valuable assets of DCC's estate, which are affected by the plaintiffs' suits against the Nondebtor Codefendants. Both types of claims-over—those asserted against DCC and those asserted by DCC—must be dealt with in some fashion under DCC's plan of reorganization. It necessarily follows, then, that the very real Implant Claims against the Nondebtor Codefendants will have a substantial effect on DCC's estate.

C. The Sixth Circuit Correctly Interpreted 28 U.S.C. § 157(b)(5)

The argument that the Sixth Circuit misinterpreted 28 U.S.C. § 157(b)(5) is equally without merit, and does not provide an alternative basis for the Court to grant the writ.

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required to assert a claim for contribution against a codefendant in the same action. *See* 18 Am. Jur. 2d *Contribution* § 9 (1985) ("the right to sue [for contribution] arises when a party has paid the whole of the obligation or more than his share thereof. In either event the right to contribution is merely contingent until payment or its equivalent is made, and not until then does it become complete"); Uniform Contribution Among Tortfeasors Act § 1(b), 12 U.L.A. 194 (1996) ("The right of contribution exists only in favor of a tortfeasor who has paid more than his pro rata share of the common liability . . . .").

A necessary condition to implementing the reorganization policy underlying the bankruptcy laws is the centralization in one forum, to the maximum extent permitted by the United States Constitution, of all the debtor's assets, as well as a process for dealing with all the debtor's liabilities.[10] Consistent with congressional intent and the words of the Bankruptcy Code, the Sixth Circuit properly construed § 157(b)(5) to permit centralization of claims against nondebtors in cases where the failure to centralize would harm the debtor's prospects of reorganization. *See A.H. Robins Co. v. Piccinin (In re A.H. Robins Co.)*, 788 F.2d 994, 1011 (4th Cir. 1985) (congressional purpose of § 157(b)(5) was to "centralize the administration of the estate and to eliminate the 'multiplicity of forums for the adjudication of parts of a bankruptcy case' ") (quoting 130 Cong. Rec. H7492 (daily ed. June 29, 1984) (statement of Rep. Kastenmeier)), *cert. denied*, 479 U.S. 876 (1986).

Petitioners' argument is based on the erroneous premise that § 157(b)(5) can never authorize the transfer of claims against nondebtors. Because the language of the statute, the legislative history, and the case law do not support this assertion, however, petitioners do not, indeed cannot, cite any authority to support their proposition.

Section 157(b)(5) applies to "personal injury tort and wrongful death claims." It does not contain *any* limitations. Petitioners' argument that Congress must have meant personal injury or wrongful death claims against the estate because a different section (§ 157(b)(2)(B)) does refer to claims against the estate, is completely without merit.[11]

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[10] Congress has provided the bankruptcy courts with powerful tools in order to accomplish these goals: *see, e.g.*, 28 U.S.C. § 1334(e) (exclusive jurisdiction of district court over all debtor's property wherever located); 11 U.S.C. § 541(a) (creation of estate comprised of property wherever located); 11 U.S.C. § 105(a) (nationwide service of process).

[11] Additionally, the warning that respondents' interpretation of § 157(b)(5) would conflict with the MDL proceedings is factually erro-

As discussed *supra*, this Court has held that 28 U.S.C. § 1334(b) applies not only to actions against debtors, but also to actions against nondebtors. *See Celotex Corp. v. Edwards*, 115 S. Ct. 1493, 1498-99 n.5 (1995) (proceedings "related to" bankruptcy include "suits between third parties which have an effect on the bankruptcy estate"). It follows, then, that other provisions of title 28 of the United States Code which are related to § 1334(b) should be interpreted in a consistent manner with that section. As this Court has stated, statutory construction is

> a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.

United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 369 (1988).

Moreover, the Implant Claims against the Nondebtor Codefendants are, in effect, claims against DCC. As discussed *supra*, the claims against DCC are inextricably intertwined with the claims against respondent and the other Nondebtor Codefendants because plaintiffs have sued DCC and the Nondebtor Codefendants jointly and severally. *Cf. American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 14 (1951) ("where there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action"). As the decision

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neous. The District Court's jurisdiction to transfer claims for *trial purposes* is entirely compatible with the limited jurisdiction that is being exercised by the Multidistrict Court which, as pointed out by petitioner, coordinates *pretrial proceedings*. Tort Comm. Pet. 7. Moreover, the Multidistrict Court has no jurisdiction over state court implant claims that are the subject of the decision below. Accordingly, the statement that the centralization of the Implant Claims will disrupt the MDL system is in error.

below held, the nature of the Implant Claims establishes that DCC and the Nondebtor Codefendants are "closely related" with respect to the implant litigation. *See also Robins*, 788 F.2d at 999 (the unusual situation permitting § 362 to apply to nondebtors is the existence of "such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor").

The Sixth Circuit's conclusion that § 157(b)(5) applies to claims against debtors as well as nondebtors is directly supported by the only circuit court of appeals decision directly on point—the *Robins* decision. Prior to the filing of its chapter 11 case, Robins was faced with 5,000 Dalkon Shield actions filed in state and federal courts throughout the United States. *Id.* at 996. Over half of such actions named the debtor as the sole defendant, while the remainder named as defendants both debtor and nondebtor parties, including the debtor's insurance company, hospitals, and physicians. The district judge granted the debtor's motion pursuant to § 157(b)(5) to transfer all 5,000 actions, including those against nondebtor defendants, to the district court in which the bankruptcy case was pending. The scope of the order was very clear and explicitly transferred claims against nondebtor codefendants:

> ORDERED, pursuant to Sections 157(b)(5) and 1334(b) of Title 28 of the United States Code, that to the extent personal injury tort or wrongful death actions against Robins *or any other defendant* that are related to the Robins Chapter 11 case are to be tried in a district court, such action shall be tried in the Richmond Division of the United States District Court for the Eastern District of Virginia; and it is further
>
> ORDERED, pursuant to Section 1334(b) of Title 28 of the United States Code, that *all actions based*

> *upon personal injury tort or wrongful death claims* arising from the use of the Dalkon Shield intrauterine contraceptive device are proceedings related to this Chapter 11 case over which this Court has jurisdiction; and it is further
>
> ORDERED that *all actions* related to the Robins Chapter 11 case, as determined by this Order, now pending in any federal district court or subsequently removed to any federal district court during the pendency of this Chapter 11 case, be transferred by the Clerks of those Courts to this Court . . . .

In re A.H. Robins Co., No. 85-01307-R (E.D. Va. Nov. 9, 1985) (emphasis added).

On appeal, the Fourth Circuit confirmed the consolidation in the district court of all Dalkon Shield claims commenced against both the debtor and nondebtors:

> [T]here are very real considerations that support a centralization of *all* the Dalkon Shield claims, at least at first, in the district court having jurisdiction of the bankruptcy. The "single focal point" of this proceeding is the development of a reasonable plan of reorganization for the debtor, one which will work a rehabilitation of the debtor and at the same time assure fair and non-preferential resolution of the Dalkon Shield claims.

Robins, 788 F.2d at 1011 (emphasis added). *See also Murray v. Pan Am. World Airways, Inc. (In re Pan Am Corp.)*, 16 F.3d 513 (2d Cir. 1994) (§ 157(b)(5) applied to transfer of wrongful death lawsuits naming two Pan Am debtors and one nondebtor Pan Am affiliate).

Petitioners argue that the *Robins* decision should be ignored because no transfer of claims actually occurred. What petitioners fail to state, however, is that after the Fourth Circuit concluded that centralization would be the rule, the parties

reached a settlement in connection with a plan of reorganization. *See In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir.) (approving settlement), *cert. denied*, 493 U.S. 959 (1989). The fact that the physical transfer of claims under § 157(b)(5) was rendered unnecessary as a result of the settlement has absolutely no bearing on the correctness or ultimate efficacy of the Fourth Circuit's decision. Indeed, because the decision below is entirely consistent with the Fourth Circuit's decision in *Robins*, petitioners have failed to demonstrate the existence of a circuit split regarding the interpretation of § 157(b)(5), which is a further reason for the Court to deny the Petitions.

Accordingly, because the decision below interpreted 28 U.S.C. §§ 1334(b) and 157(b)(5) correctly, does not conflict with the decision of any other court of appeals, and is consistent with this Court's decision in *Celotex*, the Court should deny petitioners' request for a writ of certiorari.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be denied.

Respectfully submitted,

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November 27, 1996

RESPONDENT'S APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 95-CV-72397-DT

In Re:

DOW CORNING CORPORATION,

Debtor.

HON. DENISE PAGE HOOD

MEMORANDUM OPINION AND ORDER ON REMAND REGARDING SECTION 1334(C) ABSTENTION

I. *INTRODUCTION*:

This matter is before the Court on remand from the United States Court of Appeals for the Sixth Circuit. *In re: Dow Corning Corporation*, Nos. 95-2034/2082/2084/2106/2107, 86 F.3d 482 (6th Cir. 1996) (Amended). This Court previously entered an order finding that it did not have subject matter jurisdiction over the tort claims against the nondebtor defendants pursuant to 28 U.S.C. § 157(b)(5). The Sixth Circuit reversed this Court's determination on this issue and found that this Court had subject matter jurisdiction over the tort claims pending against the nondebtor defendants pursuant to 28 U.S.C. § 157(b)(5). The Sixth Circuit remanded this case on the issue of whether or not this Court should abstain from the tort claims against the nondebtors pursuant to 28 U.S.C. § 1334(c)(1) and/or (2).

II. *ANALYSIS*:

A. *Whether this Court must abstain or, alternatively, exercise its discretion to abstain pursuant to 28 U.S.C. § 1334(c).*

1. *Mandatory Abstention.*

The Sixth Circuit has concluded that this Court has "related to" jurisdiction pursuant to 28 U.S.C. § 1334(b) over the actions pending against the nondebtors Dow Chemical, Corning Incorporated, Minnesota Mining, Baxter, and Bristol-Myers Squibb in nonbankruptcy forums nationwide. *In re Dow Corning Corp., supra* at 494. In a section 157(b)(5) motion, an abstention analysis is required. *In re Pan American Corp.*, 950 F.2d, 839, 844 (2nd Cir. 1991); *In re Dow Corning Corp., supra* at 497. The Tort Claimants' briefs and other claimants' objections and responses to the nondebtors' motions under Section 157(b)(5) requested this Court to abstain under 28 U.S.C. § 1334(c).

Section 1334(c) qualifies Section 1334(b)'s broad grant of jurisdiction. *In re Dow Corning Corp.* at 497. There are two types of abstention under Section 1334(c): discretionary abstention under 28 U.S.C. § 1334(c)(1) and mandatory abstention under 28 U.S.C. § 1334(c)(2). *Id.* Mandatary abstention will be addressed first.

In order for mandatory abstention to apply, a proceeding must: 1) be based on a state law claim or cause of action; 2) lack a federal jurisdictional basis absent the bankruptcy; 3) be commenced in a state forum of appropriate jurisdiction; 4) be capable of timely adjudication; and 5) be a non-core proceeding. *Id.*

As to the first factor, the claims and causes of action at issue against the nondebtors are personal injury tort claims which are essentially state law claims. Addressing the second factor, this Court notes that the Sixth Circuit held that this Court has "related to" bankruptcy jurisdiction over the nondebtors. The personal injury tort actions against the nondebtors are not proceedings which need a determination under

the bankruptcy laws and do not arise in a bankruptcy case. Absent the bankruptcy of the debtor in this matter, this Court would lack federal jurisdiction over the actions against the nondebtors.[1] With respect to the third factor, there have been no allegations that the actions against the nondebtors have not been commenced in a state forum of appropriate jurisdiction. Satisfying the fourth factor, the parties have informed the Court that there are numerous cases ready for trial against the nondebtors. Furthermore, the Honorable Sam C. Pointer, Jr. in his March 19, 1996 (Order 29) and April 16, 1996 (Order 29B) orders and the Multidistrict Litigation Panel's April 10, 1996 Conditional Remand Order, indicate there are numerous cases against the nondebtors which are indeed ready for trial.

Considering the fifth factor, the Court must determine whether the actions against the nondebtors are non-core proceedings. There are two categories of core proceedings: proceedings "arising under" title 11 and proceedings "arising in" title 11. *In re Harris Pine Mills*, 44 F.3d 1431, 1435 (9th Cir. 1995), *cert. denied*, 115 S.Ct. 2555 (1995). Proceedings "arising under" title 11 "involve a cause of action created or determined by a statutory provision of title 11." *Id.* Proceedings "arising in" title 11 are a reference to those "administrative" matters that arise only in bankruptcy cases and are not based on any right expressly created by title 11, but nevertheless, would have no existence outside of the bankruptcy. *Id.* Section 157(b)(2) provides a nonexclusive list of proceedings

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[1] The only cases against the nondebtors over which this Court would have jurisdiction, sitting in the Eastern District of Michigan, are those cases that involve complete diversity. The Court notes that most of the cases involving the nondebtors also include the Debtor Dow Corning Corporation which would defeat this Court's diversity jurisdiction. (*See* the Court's Discretionary Abstention analysis, *infra*.) The Court notes that mandatory abstention also apply to removed cases. *William v. Shell Oil Co.*, 169 B.R. 684, 690-691 (S.D. Cal. 1994). The Court further notes that absent the bankruptcy, the Court has no jurisdiction over the cases against the nondebtors where the claims arose outside of the Eastern District of Michigan.

which are core proceedings. Non-core proceedings are only "related to" a case under title 11. *Id.* at 1435. A non-core proceeding "does not invoke a substantive right created by the federal bankruptcy law and is one that could exist outside of bankruptcy." *Id.*

Personal injury tort or wrongful death claims are excluded from the catalog of core proceedings by 28 U.S.C. § 157(b)(2)(B) and (O) which state in pertinent part:

> (b)(2) Core proceedings include, but are not limited to—
>
> * * *
>
> (B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 *but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11*;
>
> * * *
>
> (O) other proceedings affecting the liquidation of assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, *except personal injury tort or wrongful death claims*.

28 U.S.C. § 157(b)(2)(B) and (O) (emphasis added). *In re Hughes*, 98 B.R. 115, 118 (D.C. 1988). The actions against the nondebtor defendants are non-core proceedings under 28 U.S.C. § 157.

Section 157(b)(4) provides that "[n]on-core proceedings under § 157(b)(2)(B) of title 28 [liquidation of personal injury tort or wrongful death cases], shall *not* be subject to the mandatory abstention provisions of Section 1334(c)(2)." *In re Pan Am*, 950 F.2d at 845; 28 U.S.C. § 157(b)(4). As indicated above, the non-core proceedings included in Section

157(b)(2)(B) are "liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims *against the estate* for purposes of distribution in a case under title 11." (Emphasis added). Here, the personal injury and/or wrongful death tort actions are *not* "against the estate" of the debtor but against the nondebtors. Consequently, the non-core proceedings and actions against the nondebtors are *not* exempt from mandatory abstention under Section 157(b)(4). Moreover, 28 U.S.C. § 1334(c)(2) provides for mandatory abstention in cases involving state law claims for which the sole basis of bankruptcy jurisdiction is "related to" jurisdiction. *Celotex Corp. v. Edwards*, 115 S.Ct. 1493, 1506, note 10 (1995) (Stevens, J., dissenting). In the instant case, the Sixth Circuit held that this Court had Section 1334(b) or "related to" jurisdiction over the actions pending against the nondebtors in nonbankruptcy forums nationwide. *In re Dow Corning*, *supra* at 494. Based on the above, the Court finds that the four factors calling for mandatory exemption under Section 1334(c)(2) have been met.

2. *Discretionary Abstention.*

Alternatively, the Court exercises its discretion to remand pursuant to 28 U.S.C. § 1334(c)(1). Section 1334(c)(1) provides:

> Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

In *In re White Motor Credit*, 761 F.2d 270 (1985), the Sixth Circuit noted:

> ... federal courts should be hesitant to exercise jurisdiction when state issues substantially predominate, whether in terms of proof, of the scope of

> the issues raised, or of the comprehensiveness of the remedy sought.

Id. at 274 (quotations omitted). Here, the personal injury/tort claims against the nondebtors are predominantly state law claims. The proof and scope of issues in dispute and the comprehensiveness of the remedies sought varies state to state. The Sixth Circuit in *In re White Motor* further noted that:

> ... in large bankruptcy cases with hundreds or even thousands of tort litigants beating on the door of one federal judge, ... at least judicial economy and expeditiousness, may depend on the court's authority to refer cases to other courts. Since the 1984 Bankruptcy Act prevents reference of these tort cases to bankruptcy courts, as in the past, it makes good sense to give the district courts wide latitude in referring the cases through abstention to other courts.

Id. The Court finds that discretionary abstention from the cases against the nondebtors would best serve the interest of justice and comity. Waiting until the estimation and confirmation of a plan of reorganization before the actions against the nondebtors are liquidated would not result in a more precise estimation of the assets needed by the debtor's estate to cover any indemnification and contribution claims against the debtor's estate. The estimation of any possible indemnification and contribution claims by the nondebtors against the debtor's bankruptcy estate would not be any different than if the cases against the nondebtors proceed to trial at this stage. To the contrary, as the various trials proceed against the nondebtors, a clearer picture would emerge as to whether the nondebtors would have any indemnification or contribution claims against the debtor's estate.

The Sixth Circuit opinion addresses the Joint Insurance issue between Dow Corning, Dow Chemical and Corning Incorporated finding that the Court had "related to" jurisdiction based on the Joint Insurance between the parties. The

Sixth Circuit opinion does not address the Joint Insurance issue as it pertains to the abstention issue. This Court addresses this issue as it relates to the interest of justice and comity issues which must be addressed in an analysis of discretionary abstention. Although Dow Chemical has apparently notified insurers that it is asserting claims against the jointly-held policies, it has been argued that as to Dow Chemical, the joint policies are in fact excess policies and that Dow Chemical has sufficient primary insurance. (Ex. A, p. 5, Official Committee of Tort Claimants' Brief, filed June 7, 1996). The Sixth Circuit's opinion addresses the insurance issue from the point of view of whether the Debtor's estate will have sufficient resources. The Debtor itself has not put forth proof that its estate would be dissipated based upon the "threat" posed to those insurance policies by Dow Chemical and Corning Incorporated. In *The Matter of Zale Corp.*, 62 F.3d 746 (5th Cir. 1995), the Fifth Circuit found that even if the bankruptcy court had "related to" jurisdiction over certain insurance policies with indemnification contracts, a nondebtor should not be shielded by the powers of the bankruptcy court. *Id.* at 760-761. The Bankruptcy Code discharges the Debtor's liabilities and not those owed by third parties. *Id.* at 760, notes 42, 43, and 44; 11 U.S.C. § 524(e). If the Court does not abstain from the tort claims against the nondebtors, the tort claims against the nondebtors would effectively be determined by this Court which would be contrary to 11 U.S.C. § 524(e). Section 524(e) does not allow the Bankruptcy Code to be used to discharge the debts of nondebtors. *Id.*, at 760, notes 42, 43, and 44. The Court finds that the "threat" posed to the insurance policies by the nondebtors does not overcome factors in favor of discretionary abstention. Specifically, the Court finds the interests of justice and comity weigh in favor of discretionary abstention.

III. *CONCLUSION*:

This Court finds that the cases against the nondebtors are subject to mandatory abstention under 28 U.S.C. § 1334(c)(2). Alternatively, the Court finds that in the interest of justice, comity and judicial economy, it will exercise its discretion to abstain from the cases against the nondebtors under 28 U.S.C. § 1334(c)(1).

Accordingly,

IT IS ORDERED that the actions against the nondebtor defendants are subject to mandatory abstention under 28 U.S.C. § 1334(c)(2); alternatively,

IT IS ORDERED that the Court will exercise its discretion to ABSTAIN from the cases against the nondebtors under 28 U.S.C. § 1334(c)(1).

/s/ DENISE PAGE HOOD
DENISE PAGE HOOD
United States District Judge

DATED: JUL 30 1996